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THE ENFORCEMENT CLAUSES OF THE CIVIL WAR AMENDMENTS: A REPOSITORY OF LEGISLATIVE POWER

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The thirteenth amendment abolished slavery and involuntary servitude. The fourteenth amendment provided that no state shall abridge the privileges or immunities of the citizens of the United States and that no state shall deny any person life, liberty, or property without due process of law nor deny any person the equal protection of the laws. The fifteenth amendment ensured that the right to vote shall not be abridged on account of race, color, or previous condition of servitude. Historically, these amendments have been viewed as self-executing and have been given force and effect without further legislation.[1] However, in addition to the self-executing portion of the amendments, there was added to each an enforcement clause which provided Congress with the power to enforce the amendment by appropriate legislation.[2]

JUDICIAL DEVELOPMENT OF THE ENFORCEMENT CLAUSES

Throughout the nineteenth and the first half of the twentieth centuries, the enforcement clauses of the Civil War amendments had little impact on constitutional law. This can be explained, in part, by the curious interpretation given the enforcement clauses by the Supreme Court. In *United States v. Cruikshank*,[3] the defendants were charged with conspiring to prevent citizens of African descent from exercising their right of franchise and the rights and privileges secured to them by the United States Constitution and laws thereunder. The conduct charged was made an indictable criminal offense by section six of the Enforcement Act.[4] The defendants were convicted at trial, and on appeal, the Circuit Court for the District of Louisiana was divided and certified the question to the United States Supreme Court. In reversing the convictions, the Court commented on the enforcement provisions of the fourteenth and fifteenth amendments:

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1 *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968); Civil Rights Cases, 109 U.S. 3, 20 (1883); Butler v. Perry, 67 Fla. 405, 66 So. 150, *aff'd*, 240 U.S. 328 (1914).

2 U.S. CONST. amend. XIII, § 2; amend. XIV, § 5; amend. XV, § 2.

3 92 U.S. 542 (1876).

4 Act of May 31, 1870, ch. 114 § 6, 16 Stat. 141.

> The fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not . . . add anything to the rights which one citizen has under the Constitution against another. The equality of rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. *This the amendment guarantees, but no more. The power of the national government is limted to the enforcement of this guaranty.*
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> . . . .
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> . . . From [the fifteenth amendment] it appears that the right of suffrage is not a necessary attribute of national citizenship; but that exemption from discrimination in the exercise of that right on account of race, etc., is. The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the last has been.[5]

Consequently, according to the logic of Chief Justice Waite's opinion, the enforcement clauses merely gave Congress the permission to guarantee rights which owed their existence to the authority of state governments. As Chief Justice Fuller succinctly stated several years later, "The Fourteenth Amendment . . . did not invest . . . Congress with power to legislate upon subjects which are within the domain of state legislation."[6]

This interpretation contemplated a twofold approach by which the courts would look to state law to determine what rights, if any, were involved, and then only secondarily to Congress as the guarantor of such state rights. In practical effect, therefore, this surety-type role which was defined for Congress gave it little, if any, authority under which it could pass remedial legislation except in those instances where a state followed a contradictory policy of giving rights with one hand and taking them away with the other. This type of situation, of course, was doomed to be a rarity for it was much easier never to give than to give and simultaneously take away.

In the last half of the twentieth century, with its impetus for social reform, the enforcement clauses of the Civil War amendments gained a new constitutional prominence. In three landmark cases,

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[5] 92 U.S. at 554-55, 555-56 (emphasis added).
[6] Wilkerson v. Rahrer, 140 U.S. 545, 554-55 (1891).

South Carolina v. Katzenbach,[7] *Katzenbach v. Morgan*,[8] and *Jones v. Alfred H. Mayer Co.*,[9] the Supreme Court appeared to offer definitive answers concerning the scope of Congress' power under the three clauses.

In *South Carolina v. Katzenbach*,[10] the Court held that the provisions of the Voting Rights Act of 1965[11] pertaining to the suspension of state eligibility tests[12] and to the usage of federal voting examiners and federal standards for registration of state voters[13] were appropriate means for carrying out Congress' constitutional responsibilities under the fifteenth amendment to ensure the right of franchise for blacks. In reaching this result, Chief Justice Warren noted that section two of the fifteenth amendment gave Congress the power to legislate in order to effectuate the constitutional guarantee of the right to vote embodied in the first section of that amendment:

> [Section] 2 of the Fifteenth Amendment expressly declares that "Congress shall have power to enforce this article by appropriate legislation." By adding this authorization, the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in § 1. "It is the power of Congress which has been enlarged . . . ."[14]

This holding was unanimous inasmuch as Justice Black concurred in the majority's view of the scope of congressional power under the fifteenth amendment while dissenting, in part, on other grounds.[15]

Chief Justice Warren also enunciated the test to be used in deciding whether or not the enforcement legislation actually falls within the permissible legislative purposes of the amendment. Borrowing from *McCulloch v. Maryland*,[16] the Court held:

> The basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States. Chief Justice Marshall laid down the classic formulation, 50 years before the Fifteenth Amendment was ratified:
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> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are

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7 383 U.S. 301 (1966).
8 384 U.S. 641 (1966).
9 392 U.S. 409 (1968).
10 383 U.S. 301 (1966).
11 42 U.S.C. § 1973 *et seq.* (1970).
12 *Id.* § 1973b.
13 *Id.* § 1973d.
14 383 U.S. at 325-26, *quoting* Ex parte Virginia, 100 U.S. 339, 345 (1880).
15 *See* 383 U.S. at 355 (Black, J., concurring in part, dissenting in part).
16 17 U.S. (4 Wheat.) 316 (1819).

> plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional."[17]

Consequently, *South Carolina v. Katzenbach* unanimously held that the enforcement clause of the fifteenth amendment gave Congress the separate and distinct power to legislate for the purpose of protecting and promoting voting by blacks, and that use of the apparatus of the federal government under the Voting Rights Act of 1965 was a legitimate and rational means of implementing that end.

Shortly thereafter, the Supreme Court, in *Katzenbach v. Morgan*,[18] held that the same Act was a proper exercise of the powers granted to Congress by the enforcement clause of the fourteenth amendment and was properly applied to prohibit the enforcement of New York election laws which required the ability to read and write English as a condition for voting. In reaching this result, Justice Brennan observed for the majority that it was not necessary for the Court to agree that the state activity which was restricted by federal statute must be in itself a violation of the equal protection clause:

> A construction of § 5 [of the fourteenth amendment] that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment. It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the "majestic generalities" of § 1 of the Amendment.[19]

Justice Brennan also restated the *McCulloch v. Maryland* formulation as the proper test for determining the legitimate scope of congressional power under section five of the fourteenth amendment and concluded by arguing that the enforcement clause gave Congress the power to decide what legislation was necessary to guarantee all persons the equal protection of the law:

> Correctly viewed, § 5 [of the fourteenth amendment] is a positive grant of legislative power authorizing Congress to exercise its

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17 383 U.S. at 326-27, *quoting* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

18 384 U.S. 641 (1966).

19 *Id.* at 648-49 (footnotes omitted).

> discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.[20]

In anticipation of Justice Harlan's dissent,[21] Justice Brennan noted in a footnote that section five of the fourteenth amendment gave Congress no power to dilute the protection afforded by the amendment.[22]

The majority holding of *Katzenbach v. Morgan*, in conjunction with *South Carolina v. Katzenbach*, appeared to set clear guidelines regarding the scope of congressional power under the enforcement clauses. So long as it was rationally related to enforcing the policies of the amendments, federal legislation was constitutionally "appropriate" even though it had no premise in the enumerated powers of Congress under article I, section eight of the Constitution.[23] Congress could not, however, use the enforcement clauses to enact by statute that which was prohibited by amendment. In ultimate effect, the Supreme Court was giving federal legislation under the enforcement clauses the same presumption of validity that it gives all legislative enactments while at the same time explicitly noting that it would not allow the use of this presumption to effect the repeal of the amendments' guarantees by statutory enactments.

Finally, in *Jones v. Alfred H. Mayer Co.*,[24] the Court resurrected the enforcement clause of the thirteenth amendment to hold that a dormant, one-hundred-year-old statute which provided for equality of the races with respect to inheriting, purchasing, leasing, selling, holding, and conveying real and personal property was a constitutionally valid attempt to eliminate the badges and incidents of slavery. Blacks were therefore entitled to seek declaratory and injunctive relief under this statute against private citizens who refused to sell personal or real property to blacks solely on the grounds of race. In commenting on the scope of congressional power thus recognized, the majority opinion by Justice Stewart held that under the thirteenth amendment Congress had the power to determine the badges of slavery "and the authority to translate that determination into effective legis-

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20 *Id.* at 651.

21 *See id.* at 659, 668 (Harlan, J., dissenting). Justice Harlan feared that this discretion over the scope of the amendment's enforcement legislation was tantamount to giving Congress the power to dilute the amendment's protection.

22 *Id.* at 651 n.10. *See* note 56 *infra*.

23 For an excellent comparison between the *McCulloch v. Maryland* standard on "necessary and proper" legislation and the "appropriate legislation" standard of the enforcement clauses, see Judge Wisdom's opinion in United States v. Louisiana, 225 F. Supp. 353, 360-61 (E.D. La. 1963), *aff'd*, 380 U.S. 145 (1965).

24 392 U.S. 409 (1968).

lation."[25] Congress was vested with the theoretical and actual power not only to eliminate slavery but also the badges and incidents thereof, and in so legislating for this purpose, to pass laws governing the action of state governments and private conduct as well:

> As its text reveals, the Thirteenth Amendment "is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." It has never been doubted, therefore, "that the power vested in Congress to enforce the article by appropriate legislation," includes the power to enact laws "direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not."[26]

This trio of cases appeared to offer definitive answers regarding the scope of congressional power under the enforcement clauses. The surety-role definition of Chief Justice Waite's opinion in *United States v. Cruikshank*[27] was abandoned in favor of another nineteenth century approach formulated by Justice Strong in *Ex parte Virginia*:[28]

> All of the [Civil War] amendments derive much of their force from [the enforcement clauses]. It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. Whatever legislation is appropriate, that is, adapted to carry out the objects the Amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.[29]

Applying the logic of this opinion, the three landmark decisions of the Warren Court trio held that the enforcement clauses were added to the self-executing provisions of the amendments so that Congress could legislate cures for the social and political ills which the amendments were only beginning to remedy. Consequently, any legislation

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[25] *Id.* at 440.
[26] *Id.* at 438, *quoting* Civil Rights Cases, 109 U.S. 3, 20, 23 (1883).
[27] 92 U.S. 542 (1876).
[28] 100 U.S. 339 (1880).
[29] *Id.* at 345-46 (emphasis in original).

which was rationally related to the purposes of the amendments was constitutionally legitimate. Furthermore, the Court explicitly noted that it would not allow Congress to legislate under the guise of the enforcement clauses to dilute the constitutional guarantees of the amendments. The clear weight of these precedents, therefore, gave Congress wide latitude in passing "rational" legislation to enforce the Civil War amendments.

Oregon v. Mitchell — RETREAT FROM PRECEDENT

In *Oregon v. Mitchell*,[30] the Supreme Court decided four constitutional issues regarding the Voting Rights Act Amendments of 1970.[31] Without the benefit of a majority opinion and in five separate opinions, the Court per Justice Black announced its judgment: (1) that the provision lowering the minimum voting age from 21 to 18 was valid as applied to *federal* elections; (2) that the provision lowering the minimum voting age from 21 to 18 was invalid as applied to *state* elections inasmuch as section five of the fourteenth amendment did not authorize Congress to legislate qualifications for state elections; (3) that the suspension of literacy tests for five years for federal, state, and local elections was a valid exercise of congressional power under section five of the fourteenth amendment and section two of the fifteenth amendment inasmuch as Congress based its determination on a finding of fact that literacy tests were used to deprive blacks of the franchise; and (4) that federal legislation governing registration and absentee voting in presidential elections was constitutional.[32] In reaching these results, the Court abandoned the precedents of the 1960's and carved out new constitutional requirements for congressional legislation under the enforcement clauses.

The Black Interpretation

Justice Black wrote that the historical context of the Civil War amendments was of overriding importance and that the enforcement clauses were chiefly intended to give Congress power to legislate over *racial* discrimination:

> The Fourteenth Amendment was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection. Nor was the Enforcement Clause of the Fourteenth Amendment intended to prohibit every discrimina-

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30 400 U.S. 112 (1970).
31 Pub. L. No. 91-285, § 1, 84 Stat. 314, *amending* 42 U.S.C. § 1973 *et seq.* (1970).
32 400 U.S. at 117-19.

> tion between groups of people. On the other hand, the Civil War Amendments were unquestionably designed to condemn and forbid every distinction, however trifling, on account of race.[33]

Given this requirement of racial discrimination, Justice Black held that the suspension of literacy tests was a valid exercise of power under the enforcement clauses of the fourteenth and fifteenth amendments, but that interference with age requirements in state elections was unwarranted since section five of the fourteenth amendment was not intended to cover unequal treatment on account of age: "I would hold that Congress has exceeded its powers in attempting to lower the voting age in state and local elections."[34]

The Brennan, White, and Marshall Interpretation

In addressing the issue of congressional control over state voting age qualifications, Justices Brennan, White, and Marshall rejected Justice Black's view that the authority conferred by section five of the fourteenth amendment was limited to eliminating racial discrimination. These three Justices believed that, so long as there is a rational factual basis for the legislative determination that equal protection of the laws is being denied, then no further judicial inquiry regarding constitutionality is required.[35] Furthermore, Justice Brennan's opinion reiterated the position of *Katzenbach v. Morgan* that the standard for determining the appropriateness of legislation under the amendment was *not* the same as that used for a judicial determination of state action in violation of equal protection. Rather, "[t]he question is the scope of congressional power under § 5 of the Fourteenth Amendment."[36]

Within this conceptual framework, the Brennan opinion was able to conclude that, because Congress based its determination that restricting voters between the ages of 18 and 21 was a denial of equal protection on sufficient factual data, the federal statute was constitutionally valid as appropriate legislation under the fourteenth amendment:

> We believe there is serious question whether a statute granting the franchise to citizens 21 and over while denying it to those between the ages of 18 and 21 could, in any event, withstand present scrutiny under the Equal Protection Clause. Regardless

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[33] *Id.* at 127.

[34] *Id.* at 130.

[35] *Id.* at 229, 248-49 (Brennan, White, and Marshall, JJ., concurring in part, dissenting in part).

[36] *Id.* at 246.

> of the answer to this question, however, it is clear to us that proper regard for the special function of Congress in making *determinations of legislative fact* compels this Court to respect those determinations unless they are contradicted by evidence far stronger than anything that has been adduced in these cases. We would uphold [congressional extension of the vote to 18 year olds] as a valid exercise of congressional power under § 5 of the Fourteenth Amendment.[37]

The Stewart, Burger, and Blackmun Interpretation

Justice Stewart, in an opinion joined by Chief Justice Burger and Justice Blackmun, took the position that Congress has *no* power to determine voter qualifications in state or federal elections. Justice Stewart was "convinced that Congress was wholly without constitutional power to alter — for the purpose of *any* elections — the voting age requirements now determined by the several states."[38] To validate this premise, the opinion pointed to article I, sections two and four of the Constitution as wholly and unalterably reserving within the domain of state sovereignty the right of state legislatures to determine all qualifications for voting. Given the contradictory policies of article I, section two, and of the federal statutory reduction of state voting age requirements, the Stewart opinion quoted Justice Black to justify the conclusion that statutory interference with state voting prerequisites must not endure:

> It is a plain fact of history that the Framers never imagined that the national Congress would set the qualifications for voters in every election from President to local constable or village alderman. It is obvious that the whole Constitution reserves to the States the power to set voter qualifications in state and local elections, except to the limited extent that the people through constitutional amendments have specifically narrowed the powers of the States.[39]

The problem posed by the Black-Stewart-Burger-Blackmun view is how one can consistently advocate that the fourteenth amendment validly changed the structure of federal-state relations by imposing a federal constitutional standard of equal protection of the laws on the state *except* for the area of state control of elections. Logic suggests that it is futile to refer back to pre-amendment provisions of article I, sections two and four to justify absolute state control over voter quali-

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[37] *Id.* at 240 (emphasis added).

[38] *Id.* at 282 (Stewart, Blackmun, JJ., & Burger, C.J., concurring in part, dissenting in part).

[39] *Id.* at 294, *quoting* Justice Black's opinion, *id.* at 125.

fications of all elections and to argue that equal protection of the laws was not *then* the mandate of constitutional law. Yet, in essence, that was the Black-Stewart approach, and their opinions refuse to recognize the historical fact that the fourteenth amendment also amended article I. Justice Stewart's statement that Congress has the power to regulate interstate commerce, but may not, in the exercise of that power, impinge upon the guarantees of the Bill of Rights is correct.[40] However, his application of the converse of that rule is wholly without support in logic. Although commerce clause legislation cannot interfere with first amendment rights, first amendment rights obviously limit congressional power under the commerce clause. For example, if a federal statute provided for censorship in the interstate delivery of newspapers, magazines, and other periodicals it would be stricken down as an exercise of power under the commerce clause which violated first amendment rights. By analogy, therefore, state legislation pursuant to article I, section two, which provided that only brown-eyed brunettes of Anglo-Saxon descent are qualified to vote would be in contravention of the fourteenth amendment and would be subject to revision by the judiciary or appropriate federal legislation.

The Harlan Interpretation

Justice Harlan argued that the intent of the framers of the amendments conclusively determined the breadth of congressional power to pass appropriate legislation. He then demonstrated by reciting the history of the amendments that the framers never intended the equal protection clause to provide for equality of voting rights under state law.[41] Given this premise, the judiciary — and Congress — were completely powerless to strike down an otherwise obvious violation of equal protection of the laws. Justice Harlan bolstered this argument by pointing out that state power over voting qualifications was reserved to the states under article I, and by noting that, in addition to the fourteenth amendment, the fifteenth amendment was required to enfranchise blacks:

> Small wonder, then, that in early 1869 substantially the same group of men who three years earlier had proposed the Fourteenth Amendment felt it necessary to make further modifications in the Constitution if state suffrage laws were to be controlled even to the minimal degree of prohibiting qualifications which *on their face* discriminated on the basis of race.[42]

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40 *Id.* at 287.
41 *See id.* at 152, 200 (Harlan, J., concurring in part, dissenting in part).
42 *Id.* at 200 (emphasis added).

Consequently, under the Harlan view, the domain of state sovereignty as it pertained to voter qualifications in state and federal elections remained wholly inviolate, and section five of the fourteenth amendment gave Congress *no authority whatsoever* to eliminate discrimination in regard to voting qualifications.

There is, however, a curious twist in the Harlan opinion. In support of his conclusion Justice Harlan quotes John Marshall's assertion in *Marbury v. Madison*:[43] "It is emphatically the province and duty of the judicial department to say what the law is."[44] Although Justice Harlan ostensibly subscribed to this view, the whole thrust of his opinion was that politicians who are long dead can dictate to the judiciary the hidden meaning of their words as framed in a constitutional amendment. The ultimate result of referring to their debates and political speeches was a refusal to give effect to the plain meaning of the words of the amendment.[45] In Justice Harlan's view, therefore, the fourteenth amendment provided that no state shall deny any person the equal protection of the laws except in the instance of state laws setting voting qualifications for state and federal elections wherein the states can establish as many discriminatory practices as they see fit.

The Douglas Interpretation

In deciding the issue of voting age restrictions in federal and state elections, Justice Douglas squarely addressed the issue in terms of the scope of congressional power to affirmatively provide for the equal protection of the laws under the fourteenth amendment. In answering that Congress was vested with the power to give the 18-year-olds the vote in *all* elections, Douglas placed himself well within the province of the judicial precedents of *South Carolina v. Katzenbach, Katzenbach v. Morgan,* and *Jones v. Alfred H. Mayer Co.*, and held that section five was a positive grant enabling Congress to pass appropriate legislation.[46] In deciding whether or not the legislation was appropriate, Justice Douglas reiterated Chief Justice Marshall's "test" in *McCulloch v. Maryland,* and argued that "[t]he reach of § 5 to 'enforce' equal protection by eliminating election inequalities would seem quite broad."[47] Consequently, the power of Congress to give 18-year-

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43 5 U.S. (1 Cranch) 137 (1803).

44 400 U.S. at 204, *quoting* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

45 For a classic argument over the weight to be given the framers' original intent, see Beard, *The Supreme Court — Usurper or Grantee?* 27 POL. SCI. Q. 1 (1912).

46 400 U.S. at 135, 141 (Douglas, J., concurring in part, dissenting in part).

47 *Id.* at 143.

olds the vote in federal and state elections through statute was "appropriate" to ensure the equal protection of the laws.

Replying to the proposition that article I reserved the power to set voter qualifications to the states, Justice Douglas stated the obvious: article I, section two was amended and must be read in light of such amendments. "[T]he Civil War Amendments — the Thirteenth, Fourteenth, and Fifteenth — made vast inroads on the powers of the States. Equal protection became a standard for state action and Congress was given authority to 'enforce' it."[48]

In answer to the view that the equal protection clause was intended to apply only to racial discrimination, Justice Douglas noted that it was far too late in time to adopt this view given the nonracial discrimination cases already decided under the authority of the fourteenth amendment,[49] and that the absence of a single word in the amendment limiting it to racial discrimination alone indicates an intention to the contrary.

In essence, Justice Douglas argued against the new majority's prevailing view that, somehow, the words of the fourteenth amendment did not really mean what they said. Instead, this learned jurist argued for the application of stare decisis to support a literal reading of the enforcement clause of the fourteenth amendment.

CONCLUSION

The scope of congressional power to legislate under the enforcement clauses of the thirteenth, fourteenth, and fifteenth amendments has undergone dramatic transformation. The 1876 surety-role definition of *United States v. Cruikshank*,[50] has given way to the expansionary interpretation of the Warren Court. The Warren Court recognized that the amendments themselves were self-executing, and that the addition of the enforcement clauses indicates that something more was contemplated than mere duplication by statute of that which was already accomplished by amendment. Consequently, the Warren Court posited that the enforcement clauses were an explicit constitutional authorization for the Congress to enact legislative addenda to fulfill the constitutional policies of the amendments. As such, however, the

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48 *Id.*

49 In the appendix, 400 U.S. at 150-52, Justice Douglas indicated that the nondiscrimination prescription of the equal protection clause has been applied for the benefit of aliens, illegitimate children, mothers of illegitimate children, welfare recipients, criminal defendants, milk dealers, railroad companies, foreign corporations, and others.

50 92 U.S. 542 (1826); *see* text accompanying notes 3-5 *supra*.

Court required the traditional rational relationship test of *McCulloch v. Maryland*.[51] Thus, enforcement legislation must be able to withstand this standard of judicial scrutiny in order to be constitutionally legitimate.

The Warren Court emphasized that the rational relationship between the legislative enactment and the constitutional provision is to be judged from Congress' perspective, and the judiciary must respect that view. In this manner, the traditional presumption of validity was granted to legislation under the enforcement clauses as is customary with all federal and state statutes. Expressed in negative terms, it meant that the legislative criteria for implementing the policies of the Civil War amendments through federal statutes was not necessarily the same as judicial standards for striking down as unconstitutional state statutes under the same amendments. Implicit in this approach, was a recognition that the judicial and legislative functions are indeed different in character, and even an activist judiciary is not bestowed with the powers that an activist legislature enjoys for remedying the social and political ills intended to be abolished by the amendments.

In espousing this rational relationship test, the Court felt obligated to observe by way of footnote in *Katzenbach v. Morgan*,[52] that a legislative enactment could be irrational and unreasonable, and therefore unconstitutional, in not one but rather two distinct manners. The first type of violation is the classic example of unconstitutionality: the legislation is unduly broad in scope and therefore not authorized by the Constitution. By way of illustration, assume Congress, in an attempt to promote equal protection of the laws, passes a statute mandating absolute equality of education for all with only one prescribed course of study, thereby establishing an identical minimum-maximum level of educational attainment. It is not difficult to imagine that the Supreme Court would strike down such an educational standard imposed upon the states as exceeding the scope of congressional power under the enforcement clause of the fourteenth amendment.

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[51] *See* text accompanying notes 16-17 *supra*.

[52] 384 U.S. 641, 651-52 n.10 (1966). The Court noted that

> Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. . . . [A]n enactment authorizing the States to establish racially segregated systems of education would not be—as required by § 5—a measure "to enforce" the Equal Protection Clause since that clause of *its own force* prohibits such state laws.

Id. (emphasis added). *See* Note, *Congressional Power Under Section Five of the Fourteenth Amendment*, 25 STAN. L. REV. 885, 893-95 (1973).

The second manner of violating this rational relationship test is more subtle and, therefore, more difficult to detect. A statute could be held unconstitutional if it dilutes the guarantees of the amendments while purporting to enforce their intent. An example would be a federal statute providing for automatic job priority for American Indians who apply for jobs with state and local governments. Although the statute arguably could be an attempt to provide equal protection of the laws for American Indians by compensating them for former discrimination, in ultimate effect, it would be a dilution of the right to equal job opportunity for all nonIndians. As the Court explicitly noted in *Katzenbach v. Morgan*, dilutions of the amendment's guarantees will not be tolerated even under the guise of enforcing the amendment.[53]

With the advent of *Oregon v. Mitchell*, the approach of the Warren Court was partially abandoned. Justice Black read the enforcement clause of the fourteenth amendment as merely authorizing congressional legislation to eliminate racial discrimination. Justices Burger, Blackmun, Stewart, and Harlan joined to argue that article I, section two preserved absolute state control over age-based voting qualifications. The common element of their three opinions is that all insisted upon adding words to the amendment that are not there. Justice Black read the enforcement clause as authorizing Congress to pass appropriate legislation to promote equal protection of the laws only in regard to *racial* discrimination. Justices Burger, Stewart, Blackmun, and Harlan read that same section as permitting appropriate legislation except with regard to state voting age requirements, since in their view, the fourteenth amendment did not amend article I of the Constitution. Under this approach, even federal legislation which was rationally related to the purpose of the amendment would not be appropriate because state sovereignty over voter qualifications supersedes the fourteenth amendment.[54] While the Warren Court's expansionary interpretation of the enforcement clauses still stands except for federal legislation affecting state voting age qualifications, one must wonder whether the Court may someday apply other con-

[53] 384 U.S. at 651 n.10.

[54] The discussion in *Oregon v. Mitchell* of congressional authority to regulate state voting age requirements became academic with the passage of the twenty-sixth amendment:

> Section 1. The right of citizens of the United States who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.
> Section 2. The Congress shall have the power to enforce this article by appropriate legislation.

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stitutional provisions regarding state activities in derogation of the mandate of the fourteenth amendment.[55]

The crucial fact of history is that the enforcement clauses of the Civil War amendments remain an untapped repository of constitutional authorization for federal legislation to promote equal protection of the laws. In an era when various and sundry interest groups are pressing for constitutional amendments as the vehicle for implementing their social and cultural objectives, the fact that the constitutional mechanism is already there for implementing such objectives through legislation escapes notice.

"Abortion on demand" has become the practical reality in light of *Roe v. Wade*[56] and *Doe v. Bolton*.[57] One may speculate what would be the response to federal legislation extending equal protection of the law to all human life, including fetal life, and proscribing the usage of state funds and state-related medical institutions in assisting individuals in the termination of fetal life. Would the Supreme Court view such a statute as outside the scope of congressional authority under the enforcement clause in that the equal protection guarantee extends only to "persons" and it is the province of the judiciary to determine who falls within that term? Or would the Court adopt Justice Black's premise that the enforcement clause could not overrule another guarantee of the Constitution, namely, the right to privacy as espoused in *Wade* and *Bolton*, and thus strike down the legislation as unjustifiably interfering with the exercise of another constitutional right?

The pending equal rights amendment proposes the elimination

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[55] In *Oregon v. Mitchell*, five Justices held that the requirements of article I, § 2, providing for election of members of the House of Representatives by the residents of each state, preempted congressional authority to remedy perceived denials of equal protection through § 5 of the fourteenth amendment.. This possibly could be the pattern that the Burger Court will follow, *i.e.*, using one section of the Constitution to nullify another without attempting to interpret such sections as consistent with each other. Similarly, in California v. LaRue, 409 U.S. 109, 118-19 (1972), *rehearing denied*, 410 U.S. 948 (1973), Justice Rehnquist argued that the twenty-first amendment preempted the first amendment in some respects:

> While we agree that at least some of the performances [sexually live entertainment and films] to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink.
>
> . . . .
>
> Given the added presumption in favor of the validity of the state regulation in this area that the Twenty-first Amendment requires, we cannot hold that the regulations on their face violate the Federal Constitution.

Id. (footnote omitted).

[56] 410 U.S. 113 (1973).

[57] 410 U.S. 179 (1973).

of sexual discrimination.[58] Yet by virtue of the enforcement clause of the fourteenth amendment, the constitutional authorization exists for federal legislation advancing equal protection of the laws with regard to sex. Legislation rather than amendment or judicial construction would produce significant advantages.[59] First, in resolving one set of problems, Congress would not be bound by stare decisis to resolve the next set in the same manner. Second, differentiations based on sex could be eliminated on a selective basis, distinguishing the good from the bad.[60] Third, legislation can reconcile competing values, such as the right of privacy and the elimination of sex differentiation.[61] Finally, legislation is more quickly and easily implemented than amendment.

Given the period of benign neglect which followed the civil rights movement of the 1960's, equal protection of the laws regardless of race remains an unattained goal. Moreover, the objective of economic equality among races is far from fulfilled. Yet there is no hue and cry for enlightened congressional legislation which has as its purpose the elimination of economic disparity among the races. Assume that congressional investigation resulted in a finding of fact that the total impact of state legislation perpetuates economic inequality among the races, primarily to the detriment of blacks. Assume further that Congress provided for special funding for black scholarships and black business ventures in order to promote economic equal protection of the laws. Would the Supreme Court view such a statutory scheme outside the scope of congressional authority under the enforcement clause? Or would the Court hold that such a statute diluted the existing protections in that blacks would be singled out for receipt of government benefits to the exclusion of other racial or minority groups?

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[58] The proposed Equal Rights Amendment, H.R.J. Res. 208, 92d Cong., 2d Sess. (1972), passed by the Senate on March 22, 1972, 118 CONG. REC. 9598 (1972), and submitted to the states for ratification, provides:

> Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> Section 3. This amendment shall take effect two years after the date of ratification.

[59] *But see* Karabian, *The Equal Rights Amendment: Contribution of Our Generation of Americans*, 1 PEPPERDINE L. REV. 327 (1974). "[S]ex discrimination, like race discrimination, can be dealt with effectively only through a broad and permanent national commitment, a Constitutional amendment." *Id.* at 349 (footnotes omitted). For more extended comparisons of sex and race discrimination, see Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U.L. REV. 675, 738-41 (1971); Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499, 1507-09 (1971).

[60] *See* Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499, 1518 (1971).

[61] *Id.* at 1518.

Recognition of congressional authority to promote equal protection in racial matters has come from unlikely quarters. On March 17, 1972, President Nixon, responding to the sanctioning of busing by the courts, made the following proposal:

> The 14th Amendment to the Constitution . . . provides that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."
>
> Until now, enforcement has been left largely to the courts—which have operated within a limited range of available remedies . . . . I propose that the Congress now accept the responsibility and use the authority given to it under the 14th Amendment to clear up the confusion which contradictory court orders have created . . . .[62]

The only resulting enactments were amendments to the Higher Education Act[63] providing for temporary restraint of busing ordered "for the purposes of achieving a balance among students with respect to race, sex, religion, or socioeconomic status . . . ."[64]

Is Congress able to abolish capital punishment via the due process or equal protection clauses as some commentators have suggested?[65] Could Congress require twelve-man juries in all cases if it is factually determined that they are necessary to insure due process in state courts? Certainly the Supreme Court has not hesitated to hedge the authority of the states through judicial construction of the fourteenth amendment.

There are presently no definitive answers to the hypotheses posed above. *Oregon v. Mitchell* signalled a partial halt to the Warren Court's view that "rational is appropriate." Future interpretations of the enforcement clauses remain to be rendered. History has once again set the stage for a transformation of the amendments. Justices Harlan and Black, whose opinions were decisive in carving out limited exceptions to the Warren Court's expansionary view of the enforcement clauses, have been replaced by Justices Powell[66] and Rehnquist.[67] If one

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62 118 CONG. REC. 8929 (1972).

63 Education Amendments of 1972, Pub. L. No. 92-318, §§ 801-06, 86 Stat. 371 (June 23, 1972) (codified at 20 U.S.C. §§ 1651-56 (Supp. 1973)).

64 *Id.* § 803.

65 *See, e.g.*, Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1814 (1970).

66 Justice Powell has been compared to Justice Harlan in terms of his concern with balancing conflicting interests. Gunther, *The Supreme Court: 1971 Term, Foreword—In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 7 (1972).

67 An assistant attorney general at the time Congress debated lowering the voting age, Justice Rehnquist argued against reliance on Katzenbach v. Morgan, 384 U.S. 641

of the two should read the clauses in conformity with *Ex parte Virginia*,[68] the Warren Court's interpretation of the enforcement clauses would once again stand as the law of the land. If both should join Burger, Blackmun, and Stewart, the final definitions of the enforcement clauses could take a variety of twists and turns with ad hoc exceptions carved into the amendments under a new banner of states' rights: all which has been taken away can yet be retained. Prophecy, however, is for the sages, and pronouncements on the law of the land are for the Supreme Court.[69] The question of the scope of congressional power under the enforcement clauses remains as open today as it was in 1875 when Senator Boutwell observed:

> The thirteenth, fourteenth and fifteenth amendments did limit the power of States; they did extend the power of the General Government; and the question we are considering almost continually is the extent to which the power of the States has been limited by these amendments and the extent to which the power of the General Government has been carried by these several amendments.[70]

Until Congress attempts to use the power given in the enforcement clauses of the Civil War amendments to meet the social and political challenges posed by such issues as abortion, sex discrimination, and racial discrimination, the question of the scope of that power will remain unanswered.

(1966), to accomplish this end. Instead, he advocated the use of a constitutional amendment. 116 CONG. REC. 6965-66 (1970).

68 100 U.S. 339 (1880); *see* text accompanying notes 28-29 *supra*.

69 One commentator has "prophesied" a cautious approach by Congress in the future:

> The uncertainty generated by *Oregon v. Mitchell* will, in all likelihood, cause Congress to shy away from justifying legislation expanding civil rights solely on the basis of congressional power to interpret the 14th amendment. With reference to future racial civil rights legislation, congressional power under the 13th and 15th amendments will obviate any necessity for reliance on section 5 of the 14th amendment. Beyond racial discrimination, alternative sources of congressional power — such as the commerce clause — will almost surely be invoked.

Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 620 (1975).

70 3 CONG. REC. 1792 (1875).